IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16/03/2004

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL No.1226 of 1993

K.K.Mohammed .. Appellant

-Vs-

1. Mandokkara Subban Chetty
2. M.Karunakaran
3. M.Balakrishnan
4. M.Divakaran
5. M.Kumaran .. Respondents

This second appeal is preferred under Sec.100 of the Code of Civil Procedure against the judgment and decree dated 25.2.1993 and made in A.S.No.38 of 1987 on the file of the District Court, Nilgiris at Udhagamandalam, confirming the judgment and decree dated 7.11.1986 and made in O.S.No.265 of 1981 on the file of the District Munsif Court, Gudalur.

!For Appellant : Mr.M.Doraiswami

^For Respondents : No appearance

:JUDGMENT

The unsuccessful plaintiff in a suit for recovery of possession of the plaint Schedule mentioned property, before both the Courts below is the appellant herein.

2. The plaintiff sought for the relief of recovery of possession alleging that pursuant to a decree passed in O.S.No.34/67, an execution petition in E.P.No.77/71 was filed; that the said E.P. was allowed, and thereafter, the property of the defendant, more fully described in the plaint Schedule, was taken in Court auction by the plaintiff on 21.3.1972; that the same was confirmed on 25.4.1972; that he was also granted a sale certificate on 10.1.1973; that the first defendant is the judgment debtor in O.S.No.34/67; that the plaintiff had not taken possession within one year period; that while so, the defendants 2 to 5 issued a notice stating that the plaintiff entered into an agreement for sale on 10.8.1976 with them, and they were put in possession of the property, and under such circumstances, it has become necessary to file the suit for recovery of possession against all the defendants 1 to 5.

3. The first defendant remained ex-parte. The suit was resisted by the defendants 2 to 5. According to them, they had no knowledge about the

sale confirmation, the issue of the sale certificate, etc; but, the plaintiff entered into an agreement for sale with them in respect of the suit property on 10.8.1976, and apart from that, the plaintiff has received Rs.3,500/-, Rs.551/-, Rs.300/-, Rs.200/- and Rs.200/- in the presence of witnesses, and even after the issuance of the notice, he has received Rs.200/-, and the defendants have been in possession of the property for a very long time; that the plaintiff has not come forward with the necessary relief of partition or for declaration, but has come forward with the relief of recovery of possession, and hence, the suit was to be dismissed.

4. The trial Court framed the necessary issues, tried the suit and agreeing with the defence, dismissed the suit. An appeal by the plaintiff has also met the same fate at the hands of the first appellate Court. Hence, this second appeal has been brought forth by the plaintiff, who lost the case before both the Courts below.

5. At the time of admission, the following substantial question of law was formulated by this Court for consideration:

"Whether the auction purchaser is precluded from maintaining a regular suit for delivery of possession when he failed to file an application for delivery before the executing court within the period of limitation?"

6. This Court heard the learned Counsel for the appellant. There was no representation for the respondents, despite service of notice.

7. After careful consideration of the submission made and scrutiny of the available materials, this Court is of the considered view that the appeal requires a dismissal in the hands of this Court.

8. Pursuant to a decree passed in O.S.No.34/67 against the first defendant, execution was ordered in E.P.No.77/71 by the lower Court, and the immovable property mentioned in the Schedule annexed to the plaint was brought on auction and sold on 21.3.1972. The said property was purchased through the Court auction sale by the plaintiff, and the sale was confirmed on 25.4.1972. The sale certificate was also issued to the plaintiff on 10.1.1973; but, the plaintiff has not taken possession of the property within one year period. Both the Courts below have rejected the plea of limitation put forth by the defendants and rightly too. However, on the other grounds, the lower Courts have recorded a concurrent finding that the plaintiff cannot get the relief in the instant suit. The defendants 2 to 5 have been impleaded as parties alleging that they are also in possession of the properties. But, how they got into possession of the property is not explained by the plaintiff in the plaint. On the contrary, the defendants 2 to 5 came with a defence stating that they entered into an agreement for sale with the plaintiff on 10.8.1976; that they were also put in possession; that they are also entitled to have the rights established through that agreement, and thus, their possession was to be protected. The plaintiff examined as P.W.1 has made a candid admission stating that the defendants are in possession of the property for more than 5 decades, and the property has also not been divided. In such circumstances, the suit for recovery of possession was highly misconceived. The lower Courts have found that the plaintiff should have filed a suit for declaration and for partition of the property against all the parties concerned and rightly too. Both the Courts below have concurrently held that the plaintiff was not entitled to the relief of recovery of possession. This Court is unable to notice any reason to disturb the same.

9. For the foregoing reasons, this second appeal deserves to be

dismissed, and it is, accordingly, dismissed, leaving the parties to bear their costs.

Index: yes
Internet: yes

To:

1. The District Judge
Nilgiris
2. The District Munsif
Gudalur
3. The Record Keeper
V.R. Section
High Court, Madras.

nsv/